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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. 304

SOUTHERN BLOWPIPE & ROOFING COMPANY
and E. J. HOPTON,
Petitioners,

v.

CHATTANOOGA GAS COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case on April 17, 1968.

OPINIONS BELOW

The Memorandum on Motion for Summary Judgment filed by the District Court on October 27, 1964 (Appendix, p. 7) is unreported.

The opinion of the Court of Appeals dated May 6, 1966 (Appendix, p. 12) is published at 360 F. 2d 79. No opinions have been written by the District Court or the Court of Appeals since that date.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on April 17, 1968 (Appendix, p. 21). The petition for rehearing was denied on May 10, 1968 (Appendix, p. 25). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

May a public utility already possessed of a legal monopoly enter into a separate relevant market, normally competitive, and sell below cost in this separate market where the purpose is to expand its primary (and legally monopolized) market?

STATUTES INVOLVED

15 U.S.C. § 2, the Sherman Act, reads as follows:

Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court.

STATEMENT OF THE CASE

This suit was filed on January 7, 1964, as a class action on behalf of "the sellers and installers of gas equipment and appliances in the Chattanooga area." It was dismissed by the District Court on motion for summary judgment *because there was no specific intent* to create a monopoly (Appendix, p. 7).

The Court of Appeals reversed and sent the case back for trial, stating:

> "Notwithstanding the many cases that have treated the subject of anti-trust practices, we have been cited to none that deal with the question of whether a utility already possessed of a legal monopoly may, in the service of that monopoly, avail itself of the pecularities of utility rate-making to sell below cost in an underlying field of competition. No case has considered whether a subsidiary monopoly thus obtained offends the anti-trust laws." (Appendix, p. 16)

Upon remand the complaint was amended so as to confine the class to those engaged in the business of "selling, installing and servicing heating and air conditioning systems," and an additional plaintiff, who sold, installed, and serviced coin-operated laundries, was added.

The Trial Court, in the pretrial order (paragraph 5(a), Appendix, p. 18), posed the legal question presented here, quoting from the Court of Appeals opinion. Without opinion, the Trial Court ruled adversely to the plaintiffs on this legal question, both at the close of the plaintiffs' proof when one plaintiff was dismissed by the Court, and at the close of all the proof, when the plaintiffs' motion for a directed verdict was denied.

The Court instructed the jury that "the defendant, Chattanooga Gas Company, has of course, a lawful monopoly in the sale and distribution of natural gas in the Chattanooga area" (Appendix, p. 28), and then instructed the jury that this monopoly was not in violation of the law. In continuing the instruction the Court defined "monopolize" as "the existence of a monopoly power coupled with the intent to use it for anti-competitive or monopolistic purposes," and "monopolizing means to acquire or to maintain the power to exclude . . . competition . . . accompanied with the intent or purpose to exercise that power. In other words, both elements must be found to exist" (Appendix, p. 28-29).

When the jury returned and asked the Court to "better define an attempt to monopolize," the Court told the jury that "the defendant must have been shown to have had the specific intent to monopolize" (Appendix, p. 29). The foreman then asked clearly "could they be guilty without intent?", and the Court repeated: "They could not be guilty of attempting to do that unless they had, from a preponderance of the evidence it was shown that they intended to do just that" (Appendix, p. 30-32).

After a verdict for the defendant was returned, and a judgment entered, the plaintiffs filed a Motion for a Judgment Notwithstanding Verdict and for an Immediate Injunction, based upon the fact that the Chattanooga Gas Company was a monopoly and should be enjoined from operating in the plaintiffs' relevant markets (Appendix, p. 22). The District Court denied the motion without opinion on March 20, 1967 (Appendix, p. 23).

On appeal the first question set out in the plaintiffs-appellants' briefs was:

"Can a privately owned gas distribution company, operating as a monopoly under State law, extend its monopoly by invading the contracting business for the purpose of promoting the sale of gas, and operate this contracting business at a loss, to the damage of the contractors already in the contracting business?"

Without opinion, the Court of Appeals affirmed the District Court and denied a petition for rehearing (Appendix, p. 24).

REASONS FOR GRANTING THE WRIT

This is a class action, and presented to the Courts below a question of national importance (see material in the Appendix regarding national importance of the question, pp. 33-43). The Courts below, without opinion, found that a monopoly can legally operate in a competitive field provided there is no intent to specifically drive out competitors—these Courts held, by their inaction and approval of a jury verdict on the charge as given, that specific intent was absolutely necessary to a case under Section 2 of the Sherman Act regardless of ability to monopolize; and that a "franchised monopoly" was *not* a monopoly *per se* when operating outside its franchised market.

The results of such a policy are plain to see. In the present case, by the testimony of the defendant's own witness, out of three hundred new home installations in 1966, one hundred and forty were done by the defendant Gas Company and 95% of the remainder were "developed and pushed out" to contractors by the Gas Company—better than 97% of this market was controlled by the Gas Company (Testimony of E. J. Prince, page 504-505 of transcript, p. 26 of Appendix hereto). The Courts have, in this case, held that this does not violate the Sherman Act because the in-

tent is to sell gas. The fact that the Gas Company lost about $650,000 in the relevant market over a ten year period should indicate some measure of the damage done to the plaintiffs, named and unnamed.

CONCLUSION

As set out above, it is vital to the future administration of the antitrust laws that some guidance be given the Courts in this new field. The opinion of the Court of Appeals indicated that "the applicable rule of law should be designed after trial." The case has been tried, but no rule of law has been formed, unless we assume that specific intent is required even where a monopoly power actually exists. This should not be allowed to stand as a rule of law, and it is respectfully urged that this petition should be granted so that the reasons may be fully set out for this Court.

Respectfully submitted,

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